STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	Case No. SA-CE-1349-S PERB Decision No. 1516-S April 7, 2003

Appearances: Kelley Stimpel Rasmussen, Attorney, for Professional Engineers in California Government; Howard L. Schwartz, Chief Counsel, for State of California (Department of Personnel Administration).

Before Baker[1], Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Professional Engineers in California Government (PECG) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the State of California (Department of Personnel Administration) (State) violated the Ralph C. Dills Act (Dills Act)[2] by violating the parties' ground rules for negotiations of a new memorandum of understanding (MOU).[3] PECG alleged that this conduct constituted a violation of Dills Act sections 3517.5 and 3519(b) and (c). The Board agent dismissed the

[1]Member Baker recused himself from this Decision on June 5, 2002.

[2]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[3]PECG and the State reached agreement on a tentative MOU for State Bargaining Unit 9 on April 5, 2002.

charge on the basis that, looking at the totality of circumstances, the State's alleged violation of ground rules by its failure to support the tentative agreement did not violate the Dills Act. The allegations contained within this charge were the subject of an injunctive relief request, which the Board denied on June 14, 2002. Based upon our review of the materials in the record, including the charge and amended charge, the warning[4] and dismissal letter, PECG's appeal, and the State's opposition to PECG's appeal, the Board adopts the Board agent's dismissal as the decision of the Board itself but will address the pertinent issues below that were raised by PECG in its appeal.

DISCUSSION

There are three key allegations in the charge, two involving quotes by the Department of Personnel Administration's Director Marty Morgenstern (Morgenstern) in major California newspapers and one involving the State Department of Finance's (DOF) proposed May budget revision for Caltrans' capital outlay support budget. PECG alleges that this conduct violates its bargaining ground rules 20[5] and 23,[6] and thus Dills Act section 3519(c). In the first comment, contained in an April 22, 2002, Los Angeles Times article, Morgenstern stated that:

> 'Caltrans is taking another look at the deal as a result of the questions, . . . [t]he language on the contracting out is something that Caltrans worked on rather than us. . . . They felt this change

[4]The warning letter, at page 3, cites Compton Community College District (1989) as PERB Decision No. 128. The correct citation should be PERB Decision No. 728.

[5]Rule 20 of the parties' ground rules provides:

> PECG and the State agree to recommend acceptance of the total agreement to the Legislature.

[6]Rule 23 of the parties' ground rules provides:

> All bargaining team members and staff for both parties shall consistently and without exception support the agreement, both publicly and private [sic], until its formal approval or rejection.

> in the law met our needs and was appropriate and allowed the department flexibility on a permanent basis.'

The context of this comment responded to concerns of the business community and Assembly Republican Leader, Dave Cox (Cox) over the validity of the MOU contracting-out provision in light of the passage of Proposition 35.[7]

In the second quote, contained in a Sacramento Bee editorial dated May 2, 2002, Morgenstern stated that, "We would like to do the right thing and work out a contract that's fair to them, but we can't obviously agree to anything that would violate the will of the people . . . [w]e can't agree to stuff that's not legal." That article also quotes PECG's executive director as stating that this is the first time that the State has not honored a deal. The editorial shared these comments in the context of the Legislative Counsel's formal opinion that found the MOU contracting-out/staffing provision to violate the constitutional directive enacted by the voters in Proposition 35.

The third item involves DOF's proposed May budget revision for Caltrans' capital outlay support budget. In the Governor's May 2002 revision of his January budget, the Governor recommended reducing Caltrans' staffing levels by 379.5 personnel years (pys). According to PECG, at a May 22, 2002, Assembly Budget subcommittee hearing, the DOF proposed a larger cut in staffing of 528.5 pys. However, DOF did not recommend reductions of contracting out levels. According to PECG, these recommendations must be evaluated in light of Caltrans' 2002-03 projected workload of 12,921 pys, compared to a staffing level in the 2001-02 fiscal year of 11,804 pys. The agreement was for half of that increase in workload to be allotted to staff, after subtracting 500 excluded positions, which amounts to a negotiated increase in staffing of 308.75 pys for fiscal year 2002-03.

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[7]Proposition 35 provides State agencies with flexibility in contracting for architectural, engineering, and like services.

PECG argues that the Board agent incorrectly applied a totality of circumstances test to determine that the State's conduct was insufficient to establish bad faith. Instead, PECG asserts, the Board agent should have deemed the State's conduct to constitute a per se violation of Dills Act section 3519(c).[8] To determine whether a party has violated Dills Act section 3519(c), PERB utilizes either a "per se" or a "totality of circumstances" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143 (Stockton).) Some acts, such as an outright refusal to bargain or a unilateral change in wages, hours or terms and conditions of employment, have such potential to frustrate bargaining and to undermine the exclusivity of the employee organization that they are unlawful without any determination of subjective bad faith and are thus, a "per se" violation of Section 3519(c). (Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

It is difficult to find anything in these facts that manifest either an outright refusal to bargain or a unilateral change. Morgenstern's comments were merely responses to concerns expressed by Assemblymember Cox and the Legislative Counsel over the constitutionality of the contracting-out/staffing provision in the MOU. In his comments, Morgenstern did not repudiate the agreement, but rather, reacted to legislative questions regarding the illegality of that provision, stating that the State would "take another look at" that issue. He did not specifically denounce the provision or state that he would not support passage of Senate Bill (SB) 1213 in the Legislature. His concern was "to do the right thing." Morgenstern also did

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[8]Dills Act section 3519(c) provides:

> It shall be unlawful for the state to do any of the following:
>
> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

not say or in any way imply that PECG would be excluded from any reconsideration of the contracting-out/staffing provision. Along the same lines, there was no evidence provided by PECG that demonstrated that DOF was aware of the parties' contracting-out/staffing arrangement when the DOF prepared the proposed May budget revision. In any event, both Assembly and Senate committees ultimately rejected the proposed May budget revision and SB 1213 has been suspended by the Legislature.[9]

PECG argues that this case falls within the ambit of Placerville Union School District (1978) PERB Decision No. 69 (Placerville) and its progeny involving egregious conduct that per se violates Section 3519(c). In Placerville, the district's negotiator blatantly repudiated a deal involving an organizational security clause, a clause he had previously negotiated with the union. When the tentative agreement was submitted to the district's board for ratification, the district's negotiator recommended that the board approve the tentative agreement stripped of that provision. The union was not afforded the opportunity to comment at the board meeting. After the district board meeting, the district informed the union by letter of its decision without an offer to negotiate the change. The facts in this case therefore are distinguishable from the facts in Placerville.

This case may also be distinguished from Kern High School District (1998) PERB Decision No. 1265, in which two union negotiators actively campaigned against the negotiated tentative agreement. One of the negotiators even wore a button saying "VOTE NO." Morgenstern's statements to the press clearly did not rise to the level of repudiation of the MOU.

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[9]See www.leginfo.ca.gov. The Board takes judicial notice of the entry entitled Status for SB 1213 dated December 9, 2002 indicating that SB 1213 was suspended by the Legislature on November 30, 2002.

In Alhambra City and High School Districts (1986) PERB Decision No. 560 (Alhambra), the Board described the standard for a "per se" violation as follows:

> Absent good cause, once a tentative agreement is reached, there is an implication that both parties' negotiators will take the agreement to their respective principals in a good faith effort to secure ratification. (NLRB v. Electra Food Machinery (9th Cir. 1980) 621 F.2d 956 [104 LRRM 2806]; H.J. Heinz Co. v. NLRB (1941) 311 U.S. 514 [7 LRRM 291].) While a tentative agreement does not bind either side, it does imply that the negotiators will not "torpedo" the proposed collective bargaining agreement or undermine the process that has occurred. Absent some extenuating circumstance, such as a discovered illegality of a contract term, either side can lawfully refuse to reopen negotiations pending ratification. (See, e.g., Wichita Eagle and Beacon Publishing Company, Inc. (1976) 222 NLRB 742 [91 LRRM 1227].)
> (Alhambra, at p. 14.)

It is clear that Morgenstern's statements neither "torpedoed" the MOU nor undermined the collective bargaining process, but rather suggested the reevaluation of a provision with an alleged constitutional impediment. From the two newspaper articles, the apparent basis for the failure of SB 1213 to proceed through the Legislature is the expressed concerns of Assemblymember Cox, the Legislative Counsel, and the business interests who supported Proposition 35. PECG has further neglected to provide evidence showing DOF's knowledge of the MOU contracting-out/staffing provision and thus, any unlawful motive in submitting the proposed May budget revision to the Legislature. We therefore conclude that the State did not commit a "per se" violation of Section 3519(c).

We now turn to the issue of whether the State violated Section 3519(c) when it violated the parties' ground rules 20 and 23 and thus, engaged in "surface" bargaining. It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an

accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (General Electric Co. (1964) 150 NLRB 192, 194 [57 LRRM 1491], enf. 418 F.2d 736 [72 LRRM 2530].) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326 (Oakland).) Dilatory and evasive tactics, including canceling meetings or failing to prepare for meetings, is evidence of bad faith. (Oakland.) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: (1) negotiator's lack of authority which delays and thwarts the bargaining process (Stockton); (2) insistence on ground rules before negotiating substantive issues (San Ysidro School District (1980) PERB Decision No. 134); and (3) reneging on tentative agreements the parties already have made (Charter Oak Unified School District (1991) PERB Decision No. 873; Stockton; Placerville).

Looking at the totality of the State's conduct throughout the bargaining process, we find that PECG has provided insufficient evidence to show surface bargaining. As stated, Morgenstern's statements comprised responses to legislative concerns over the alleged

constitutional infirmity of the contracting-out provision. His response was merely that the State would reassess that provision. There is also no showing of DOF staff knowledge of the MOU contracting-out/staffing provision or of the conflict between that provision and the proposed May budget revision. PECG did not provide any other evidence showing surface bargaining as outlined above.

Even if we assumed that PECG did show that the State violated the ground rules, the Board has held that repudiation of an agreement on a single issue is insufficient by itself to show bad faith. (Stockton, at p. 24, citing NLRB v. Advanced Business Forms Corp. (2nd Cir. 1973) 474 F. 2d 457 [82 LRRM 216].) In Compton Community College District (1989) PERB Decision No. 728, the Board held that while ground rules are comparable to a mandatory subject of bargaining, reneging on ground rules is only one indicator of bad faith. Under the totality of circumstances test, a single indicator of bad faith alone does not establish a prima facie case. (Oakland Unified School District (1996) PERB Decision No. 1156, warning letter, p. 3.) The factual allegations in this case therefore are insufficient to state a prima facie case of bad faith bargaining in violation of Dills Act section 3519(c).

ORDER

The unfair practice charge in Case No. SA-CE-1349-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Neima joined in this Decision.

Dismissal Letter

July 9, 2002

Kelley Stimpel Rasmussen, Esquire
Professional Engineers in California Government
660 J Street, Suite 445
Sacramento, CA 95814

Re: Professional Engineers in California Government v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. SA-CE-1349-S
DISMISSAL LETTER

Dear Ms. Rasmussen:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 3, 2002. The Professional Engineers in California Government alleges that the State of California (Department of Personnel Administration) violated the Ralph C. Dills Act (Dills Act)[1] by violating bargaining ground rules.

I indicated to you in my attached letter dated June 21, 2002, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to June 28, 2002, the charge would be dismissed.

In my letter of June 21, I cited the long established rule that a ground rule violation is merely one indicia of bad faith that is to be considered under the totality of circumstances . Stockton Unified School District (1980) PERB Decision No. 143. I also explained that there were insufficient facts presented to demonstrate that Respondent made an effort to "torpedo" the agreement or actively campaign against it.

I received your amended charge on June 28, 2002. In that amended charge, you continue to assert that Respondent's actions constitute a "per se" violation of the obligation to bargain in good faith. However, without additional facts to support such a finding, I must dismiss this charge for the reasons given in my letter of June 21.[2]

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[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] On page 4 of your amended charge you state "the Governor is not just failing to support the agreement he reached with PECG on April 5, 2002 (in violation of the parties' ground rules), but he is actively campaigning against its ratification by the Legislature." However, no additional facts are supplied to support this allegation.

Right to Appeal

Pursuant to PERB Regulations,[3] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Bernard McMonigle
Regional Attorney

Attachment

cc: Howard Schwartz

Warning Letter

June 21, 2002

Kelley Stimpel Rasmussen, Esquire
Professional Engineers in California Government
660 J Street, Suite 445
Sacramento, CA 95814

Re: Professional Engineers in California Government v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. SA-CE-1349-S
WARNING LETTER

Dear Ms. Rasmussen:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 3, 2002. The Professional Engineers in California Government alleges that the State of California (Department of Personnel Administration) violated the Ralph C. Dills Act (Dills Act)[1] by violating bargaining ground rules.

Your charge states the following. On April 5, 2002, PECG and the State reached agreement on a tentative MOU for State Bargaining Unit 9. At the commencement of the negotiations the parties agreed to a set of ground rules. The ground rules state, in relevant part, that both parties agree "to recommend acceptance of the total agreement to the Legislature" and that "[a]ll bargaining team members and staff for both parties shall consistently and without exception support the agreement, both publicly and private, until its formal approval or rejection."

The terms of the MOU were recorded in Senate Bill 1213 and submitted to the Legislature for approval pursuant to Government Code 3517.5. The tentatively agreed MOU has not yet been ratified by the Legislature.

Section 6 of SB 1213 reflects an agreement by the parties concerning staffing at Caltrans. Under the agreement, Caltrans will accomplish increases in capital outlay support workload by contracting out one-half or less of the difference between the workload over the previous year's staffing levels, after excluding specialized services.

Newspaper articles, attached to the request for injunctive relief, reflect criticism of the staffing agreement by members of the business community. It has been alleged that the outside hiring restrictions are a violation of Proposition 35, which amended the state constitution in 2000 to make it easier for state and local agencies to contract with private construction firms.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

The April 22nd L.A. Times reported that DPA Director Mary Morgenstern stated that Caltrans is taking another look at the staffing agreement.

On April 23rd the Legislative Counsel issued a letter to Assembly Republican Leader Dave Cox in which it concluded that the staffing provision of SB 1213 "would violate Article XXII of the California Constitution, as added by Proposition 35, to the extent that section would restrict the authority of the Department of Transportation to contract for architectural and engineering services." Assemblyman Cox has been quoted as stating, "Our folks will not vote for it, because it undermines Proposition 35."

On May 2nd, a Sacramento Bee political columnist reported that the Legislative Counsel had issued an opinion that the staffing agreement was illegal. Morgenstern told him that he is prepared to reopen negotiations. Morgenstern was quoted as saying " We would like to do the right thing and work out a contract that's fair to them, but we can't obviously agree to anything that would violate the will of the people…We can't agree to stuff that's not legal."

According to information supplied by PECG, the capitol outlay support workload for 2002-2003 is scheduled to increase to 12,921.5 personnel years (PY's) from 11,804 PY's in 2001-2002. Approximately 500 of the 2002-2003 total is excluded specialized services. Thus the capitol support outlay is scheduled to increase by 617.5 PY's (1,117.5-500).

The recently released May revision of the State budget proposes to cut the Caltrans capitol outlay support workload by 528.5 PY's. According to PECG, this budget proposal contradicts the negotiated formula. Under the negotiated formula the union would expect 308.75 PY's to be added to Caltrans. Instead, the Caltrans capitol outlay support staffing will be reduced. On May 16th, a Senate subcommittee considered the Caltrans budget and rejected the 528.5 PY reduction. Instead, it proposed to divide the cuts equally between staff and contracting out. On May 22nd, an Assembly subcommittee also rejected the proposed reduction in Caltrans staff and reduced contracting out by 500 PY's. The two versions now go to conference committee.

In determining whether a party has violated the Dills Act section 3519(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

The theory of this underlying unfair practice is that the employer has committed a per se violation of the obligation to bargain by a unilateral change in the established ground rules. In its unfair practice charge, PECG relies on a statement from State of California (DPA) to assert that a violation of ground rules is a per se violation,

> Ground rule agreements represent a contractual obligation for purposes of determining whether a unilateral change from them constitutes a violation. (Stockton Unified School District (1980) PERB Decision No. 143)

However, a complete reading of State of California (DPA) provides little support for PECG's theory of a violation. That case did not overrule PERB's long established rule that a ground rule violation is merely one indicia of bad faith that is to be considered under the "totality of circumstances." Stockton USD, supra.

A review of PERB case law reveals an early case in which the Board did find that a negotiator's failure to endorse and support a total tentative agreement when it was presented to a school board for ratification, contrary to his agreement to do so, constituted a failure to meet and negotiate in good faith. Placerville Union School District (1978) PERB Decision No. 69.

However, in Stockton the Board, citing NLRB v. Advanced Business Forms Corp. (1973) 474 F. 2d 457, stated (at page 24),

> The Board affirms the hearing officer's finding that the parties had reached an agreement on March 2 on ground rules and that Crossett, the new District negotiator, reneged on that agreement. The repudiation of an agreement on a single issue has been held, by itself, not to manifest a lack of good faith. Therefore, the Board will look at the "totality of circumstances" to determine whether the District's conduct indicated good faith negotiating…

Later, the Board reiterated that a violation of ground rules is but one indicia in a "totality" analysis. In Compton Community College District (1989) PERB Decision No. 128, the Board adopted the ALJ's determination,

> PERB has held that negotiating "ground rules" is equivalent to a mandatory subject of bargaining. Stockton Unified School District, supra; Gonzalez Union High School District (1985) PERB Decision No. 480. In other words, the ground rules are as important as other matters to be negotiated. Accordingly, violation of the ground rules must be viewed as reneging on an agreement and is yet another indicia of bad faith bargaining.

Thus, ground rules are as important as other matters negotiated for the purpose of determining whether there has been a bargaining violation. Therefore, reneging on ground rules may be an indicia when considering the "totality of circumstances".

PECG appears to argue that a ground rule is more important than other bargaining topics; that a violation of a ground rule is a per se violation. The case relied upon by PECG, is not a case

in which a ground rule established in the current round of negotiations was violated. Rather, in State of California (DPA), the Board reviewed the record to determine whether over a number of years which included past negotiations, a past practice had been established on a matter within scope, union release time. The Board found no violation.

In this case, a currently negotiated ground rule is arguably violated. Despite the early Placerville USD decision[2], the rules from Stockton and Compton appear to be applicable. A ground rule violation is not a per se violation, rather it is one indicia to be considered.

PECG argues that there is either a per se violation or the actions of DPA and the Governor are sufficient to meet the totality test. Finding no per se violation, I considered the "totality of circumstances" test.

It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (General Electric Co. (1964) 150 NLRB 192, 194 [57 LRRM 1491], enf. 418 F.2d 736 [72 LRRM 2530].) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (Oakland Unified School District, supra, PERB Decision No. 326.) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (Stockton Unified School District (1980) PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (San Ysidro School District (1980) PERB Decision No. 134); and reneging on tentative

[2] The Board has affirmed the rule of Placerville. In Kern High School District (1998) PERB Decision No. 1265, the Board found that actions by two union negotiating team members who were actively campaigning against a tentative agreement, constituted an effort to "torpedo" the ratification process and stated a prima facie case of bad faith. There have been no facts demonstrated in the instant matter which demonstrates an effort to "torpedo" the agreement or actively campaign against it.

agreements the parties already have made (Charter Oak Unified School District (1991) PERB Decision No. 873; Stockton Unified School District, supra, PERB Decision No. 143; Placerville Union School District (1978) PERB Decision No. 69).

Thus, even assuming that PECG has established that the employer reneged on ground rules by not supporting the total agreement, without other indicia of bad faith there is no violation. Under the totality of circumstances test, a single indicia of bad faith does not establish a prima facie case. Oakland USD (1996) PERB Decision No. 1156. (In Oakland, the single indicia was reneging on a tentative agreement)

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before June 28, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Bernard McMonigle
Regional Attorney

BMC